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September 12, 2000

BY HAND

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: ***Notice of Written Ex Parte Presentation***
(IB Docket No. 00-91)
Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking to Access INTELSAT Directly

Dear Ms. Salas:

By its undersigned attorney, Lockheed Martin Global Telecommunications, Inc. ("LMGT"), hereby submits for filing in the above referenced docket this notice of a permitted written *ex parte* presentation. On September 11, 2000, Lawrence Secrest of Wiley, Rein & Fielding submitted a letter to Adam Krinsky, Legal Advisor to Commissioner Tristani, Clint Odom, Legal Advisor to Chairman Kennard, Mark Schneider, Senior Legal Advisor to Commissioner Ness, Peter Tenhula, Legal Advisor to Commissioner Powell and Bryan Tramont, Legal Advisor to Commissioner Furchtgott-Roth, regarding the standard which should be applied to determine whether there is "sufficient opportunity" for users and providers of telecommunications services to access INTELSAT space segment capacity directly from INTELSAT. Pursuant to Section 1.1206(b) of the Commission's rules, two copies of this written *ex parte* communication are enclosed.

Please date stamp the attached duplicate upon receipt and return it via messenger for our records. If any questions arise concerning this matter, please contact the undersigned.

Sincerely,

Eve Klindera*

Enclosure

cc: Adam Krinsky
Clint Odom
Mark Schneider
Peter Tenhula
Bryan Tramont

* Admitted to the Maryland Bar only. Practice limited to Federal Courts and Agencies.

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September 11, 2000

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Legal Advisor to Commissioner Powell

Bryan Tramont
Legal Advisor to Commissioner Furchtgott-Roth

Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking to Access INTELSAT Directly,*** **IB Docket No. 00-91**

Dear Messrs. Krinsky, Odom, Schneider, Tenhula and Tramont:

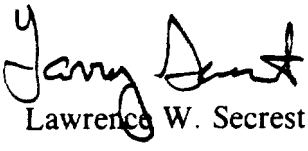
This letter is submitted on behalf of Lockheed Martin Global Telecommunications, Inc. ("LMGT"), in response to a question which arose during the September 8, 2000 meeting between LMGT representatives and the Commissioners' legal advisors. Specifically, LMGT was requested to provide additional information regarding the standard which should be utilized to determine whether users or providers of telecommunications services have "sufficient opportunity" to access INTELSAT space segment capacity directly from INTELSAT.

Although the phrase "sufficient opportunity" is not defined in the ORBIT Act, both extrinsic and extrinsic sources give clear guidance on its intended meaning. At the time of ORBIT's enactment, Congress was well aware of the fact that statutes and regulatory provisions that require private entities to provide access to services or facilities are routinely interpreted using a "rule of

reason." Under such an approach, it is universally understood that a right of access to common carrier services and facilities is not absolute – but, instead, is subject to available capacity. Indeed, even incumbent local exchange carriers (ILECs) – who are required by statute to provide traffic routing service to interexchange carriers (IXCs) and competitive local exchange carriers (CLECs) – are "only required to make services available *to the extent that such services are or can be made available with reasonable effort*, and that services offered under the provisions of its tariff are *subject to availability*." *Allnet Communications Servs., Inc. v. Public Serv. Tel. Co.*, 11 FCC Rcd 12766, ¶¶ 15, 31, 34 (Common Carrier Bur. 1996) (emphasis added). In this case, the appropriateness and applicability of the rule of reason is underscored by the inclusion of Section 641 (c). This provision, which explicitly leaves intact COMSAT's existing contracts for INTELSAT space segment capacity, would be rendered meaningless if the capacity to which "sufficient opportunity" applies is not limited to currently non-utilized INTELSAT spectrum.

Copies of the relevant pages of COMSAT's Comments and Reply Comments are enclosed for your reference. Should any further questions arise concerning this matter, kindly contact the undersigned.

Sincerely,



Lawrence W. Secrest, III

cc: *Ex Parte* File

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
Availability of INTELSAT	)	IB Docket No. 00-91
Space Segment Capacity to	)	
Users and Service Providers	)	
Seeking to Access	)	
INTELSAT Directly	)	
	)	

To: The Commission

COMMENTS OF COMSAT CORPORATION

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June 23, 2000

commitment that has not expired and COMSAT cannot be assured that it will be able to obtain another Circuit of equivalent value.

Under INTELSAT's rules, COMSAT must continue to pay for Standardized Circuits leased under long-term contracts, whether or not those Circuits are actually in service. COMSAT cannot afford to pay for "vaporware," and therefore must retain enough actual, in-service circuits to cover its contractual commitments. But again, the fact that it is committed to pay INTELSAT for those Circuits gives COMSAT every incentive to make them available to customers on competitive terms.

The asymmetry between COMSAT's Standardized Circuit contractual commitments to INTELSAT and its underlying customer commitments did not arise from any COMSAT attempt to "circumvent" the ability of carriers to obtain direct access. Rather, those arrangements, which long predate the implementation of direct access to INTELSAT, were developed at the FCC's encouragement for COMSAT to offer the lowest prices to U.S. users.[24] Thus, any temporary "problems" reflected by those arrangements are mainly due to the lack of available INTELSAT capacity and will solve themselves as more capacity becomes available and users elect the best means of access, whether via COMSAT or otherwise.

D. The ORBIT Act's Requirements Must Be Understood in the Context of a "Rule of Reason."

The phrase "sufficient opportunity" is not defined in the ORBIT Act. Accordingly, the determination of whether U.S. carriers and users currently have "sufficient opportunity to access

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[24] *See generally Policy for the Distribution of United States International Carrier Circuits Among Available Facilities during the Post-1988 Period*, 3 FCC Rcd 2156 (1988) ("*1988 Circuit Distribution Decision*") (implementing policy encouraging COMSAT to enter into very long-term leases with INTELSAT); *see also Direct Access Order*, ¶ 125 (discussing origins of this policy) (citing *1988 Circuit Distribution Decision*).

INTELSAT space segment capacity directly from INTELSAT," 47 U.S.C. § 641(b), should be understood in the context of Congress's purposes in enacting this provision.[25] As explained below, these purposes make clear that any right of access created by this legislation is not absolute. Rather, it should be construed consistently with the Commission's large body of common carrier precedent applying a "rule of reason" when construing statutorily imposed access requirements.[26]

The INTELSAT system was already experiencing a substantial system-wide shortage of space segment capacity when ORBIT was enacted in March 2000. Indeed, the *Capacity NPRM* notes that in 1999, the FCC was well aware of this situation, *Capacity NPRM*, ¶ 18, and was actively involved in the legislative process leading to ORBIT's enactment. Yet, notwithstanding this shortage, Congress left in place COMSAT's existing contractual arrangements for INTELSAT space segment capacity. Indeed, the ORBIT Act expressly precluded regulatory actions that would abrogate or modify such agreements.[27] Thus, because ORBIT clearly requires the Commission to take due account of existing capacity constraints and contractual arrangements, Congress in effect has established a "rule of reason" approach in applying the "sufficient opportunity" test of Section 641(b),

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[25] *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (statutory provisions must be interpreted "in connection with the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature").

[26] *See United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (statutes should be interpreted to "produce[] a substantive effect that is compatible with the rest of the law"); *see also* Subpart I.A, *infra* (discussing the Commission's precedents applying a "rule of reason" when construing statutorily-imposed access requirements).

[27] 47 U.S.C. § 641(c). *See also* Subpart II.B, *infra*.

This approach is fully consistent with similar "rule of reason" policies that the Commission has long followed in other analogous contexts.[28] Indeed, even incumbent local exchange carriers (ILECs)—who are required by statute to provide traffic routing service to interexchange carriers (IXCs) and competitive local exchange carriers (CLECs) "upon reasonable request"—are "only required to make services available *to the extent that such services are or can be made available with reasonable effort*, and that services offered under the provisions of its tariff are *subject to availability*." *Allnet Communication Servs., Inc. v. Public Serv. Tel. Co.*, 11 FCC Rcd 12766, ¶¶ 15, 31, 34 (Common Carrier Bur. 1996) (discussing 47 U.S.C. § 201(a)) (emphasis added).[29] Unlike the ILECs, however, COMSAT is not a dominant carrier that users

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[28] *See, e.g., Open Video Systems, Second Report and Order*, 11 FCC Rcd 18223, ¶¶ 184-85 & n.430 (1996) (adopting a "rule of reason" for determining whether a vertically integrated DBS satellite programmer's refusal to deal with a particular multi-channel video programming distributor constitutes unlawful "discrimination"), *modified in part*, 11 FCC Rcd 20227 (1996), *and rev'd in part in other respects, City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999); *MCI Communications Corp. & British Telecommunications plc, Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended*, 9 FCC Rcd 3960, ¶ 48 & n.92 (1994) (employing "rule of reason" analysis to judge the lawfulness of a territorial allocation between carriers pursuant to a joint venture, in light of economic justification and competitive effects); *Commission Policy in Enforcing Section 312(a)(7)*, 68 FCC 2d 1089 (1978) (adopting a "rule of reason" to balance the needs of political candidates with the interests of broadcast licensees, when implementing statute requiring broadcast stations to allow "reasonable access" to candidates), *aff'd, CBS Inc. v. FCC*, 453 U.S. 367, 387 (1981).

[29] The right of a CLEC or IXC to obtain service from an ILEC is not absolute. *See Allnet Communications Servs.*, 11 FCC Rcd 12766, ¶¶ 20, 34, 39-40 (denying IXC's complaint against ILEC, where the services requested were not available and could not be made available with reasonable effort). Rather, even where a common carrier has a statutory duty to provide service or to interconnect with other carriers, a user who is turned away because no capacity is available at the time has not been denied any right to carriage. *See id.* Certainly, any definition of ORBIT's phrase "sufficient opportunity" should incorporate the basic common carrier law principle that even a statutory right to obtain access to carrier capacity may be exercised only "subject to availability." *Cf. American Distance Education Consortium*, 14 FCC Rcd 19976, ¶ 22 (1999) (requiring a DBS satellite carrier to "provide space for public interest programmers at the orbit location of their choice *subject to availability*") (emphasis added).

must access to send or receive international communications.[30] *A fortiori*, if dominant ILECs need only provide access to essential facilities "subject to availability," then ORBIT should not be construed to require COMSAT—a non-dominant carrier—to guarantee access to INTELSAT's facilities without any such qualification.

II. Even Assuming That Users Experience Cognizable "Problems" in Obtaining Direct Access, ORBIT Imposes Specific Limitations On the Kinds of Regulatory "Solutions" That Would Be Permitted.

It is premature for the Commission to consider solutions when there is no evidence of any real problem. *See, e.g., Home Box Office v. FCC*, 567 F.2d 9, 50 (D.C. Cir.) (FCC may not predicate a rulemaking on "speculation and innuendo"; instead, any "solution" must stem from "a record that convincingly shows a problem to exist and that relates the proffered solution to the statutory mandate of the agency"), *cert. denied*, 434 U.S. 829 (1977); *accord Century Communications Corp. v. FCC*, 835 F.2d 292, 303 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (same). Here, Congress has made it clear that, if the Commission finds that "sufficient opportunity" does exist, that is the end of the matter. Accordingly, the FCC should defer consideration of "appropriate action" unless and until it is demonstrated that: (1) a problem exists; (2) it is due to a proven attempt to circumvent the statute; and (3) commercial negotiations

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[30] *See COMSAT Non-Dominance Order*, 13 FCC Rcd 14083, ¶ 180 (1999) (finding that COMSAT exercises no market power "with respect to its provision of INTELSAT services in the switched voice, private line, full-time video, and occasional-use video services to competitive markets"), *modified, Alternative Incentive Based Regulation of COMSAT Corp.*, 14 FCC Rcd 3065 (1999) (finding that COMSAT cannot exercise undue market power even on the few remaining international routes that are not served by any other system, by virtue of the incentive regulation plan approved by the agency); *see also Direct Access Order*, 14 FCC Rcd 15703, ¶ 124 ("On a global basis Comsat now accounts for no more than a 15 percent average global market share of the transmission capacity utilized for switched-voice and private line services. This relatively low market share suggests that these long-term contracts have not acted as a barrier to further competition through fiber optic cable and satellite alternatives.").

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To: The Commission

RESPONSE OF COMSAT CORPORATION

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July 25, 2000

Section 641 of ORBIT protects COMSAT's supply contracts with INTELSAT from governmental abrogation or modification. Indeed, as demonstrated by these letters and statements, this constituted a key element of Congress's intent underlying Section 641 of ORBIT. *See* COMSAT Comments at 29-32.

B. The ORBIT Act's Direct Access Requirement Must Be Understood In The Context Of A "Rule Of Reason."

Statutes that compel private entities to provide access to their services or facilities are generally construed using a "rule of reason." *See* COMSAT Comments at 22-25 (citing cases and discussing examples). For this reason, even monopoly LECs normally are "only required to make services available *to the extent that such services are or can be made available with reasonable effort*," and even then, only "*subject to availability*." *Allnet Communications Servs. v. Public Serv. Tel. Co.*, 11 FCC Rcd. 12766, 12771-72, 12778-80 (1996) (discussing 47 U.S.C. § 201(a)) (emphasis added). This rule of statutory construction was in place, and widely recognized, when Congress enacted the ORBIT Act. Accordingly, contrary to the assertions of the four adverse commenters, Congress did not equate ORBIT's phrase "sufficient opportunity" with an "absolute" or "unlimited" right of access or demand.

WorldCom/Sprint and Cable & Wireless largely ignore the substantial body of precedent, cited in COMSAT's Comments, establishing a "rule of reason" as the appropriate standard for the evaluation of demands for "access."[16] In contrast, ATC Teleports boldly dismisses

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[16] In its initial Comments, COMSAT posited that ORBIT should be construed consistently with other telecommunications statutes using similar language to establish analogous access requirements. *See* COMSAT Comments at 23-25. According to Sprint and WorldCom, however, COMSAT's attempt to place ORBIT *in* the proper interpretive context somehow "takes words out of context. . . ." WorldCom/Sprint Reply Comments at 5 ("public release" version). Yet by failing to address or even acknowledge the well-established "rule of reason" embraced in the many analogous cases cited by COMSAT, it is WorldCom/Sprint that seek to sever ORBIT's

"COMSAT's arguments about being regulated under a rule of reason" as "irrelevant" because "[i]t isn't COMSAT's services we want, it is INTELSAT's." ATC Teleports Reply Comments at 6. Of course, the transmission capacity ATC Teleports is seeking to access is indisputably *COMSAT's—i.e.*, it is capacity that is no longer available directly from INTELSAT precisely because *COMSAT* has lawfully acquired contractual rights to its use (and is indeed using it).[17] Accordingly, the "rule of reason" standard is not only "relevant" to a proper interpretation of ORBIT; it also stands unrefuted by any commenter in the present proceeding. With this in mind, we now turn to a discussion of the specific "solutions" proposed by the commenters.

C. The SUC (Or "NMF") Proposal Is Unlawful (And Is Not Even "Direct Access").

Implicitly recognizing that the Commission lacks authority to abrogate COMSAT's existing contracts with INTELSAT (*but see* Section II.D below), WorldCom/Sprint champion an alternative scheme which purportedly would not rely upon the direct abrogation of such contracts. This scheme was formerly known as the Satellite Users Coalition ("SUC") proposal, and now involves what is called a "Network Management Fee" or "NMF." Specifically, WorldCom/Sprint propose that the Commission require COMSAT to provide its capacity to customers at a rate consisting of the INTELSAT Utilization Charge ("IUC") plus a 2% NMF. *See* WorldCom/Sprint Comments at 13-15 (setting forth SUC proposal); *See also* Cable & Wireless Comments at 11 (endorsing SUC proposal, but conceding that it cannot solve the shortage of INTELSAT capacity).

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words from their statutory context.

[17] Moreover, as explained above, Congress has specifically provided that these contractual rights are not subject to modification or abrogation by FCC fiat. *See* Subpart II.A, *supra*. *See also* 47 U.S.C. § 765(c).